The
JOURNAL
of
CIVIL LITIGATION
Published Quarterly by the
Virginia Association of Defense Attorneys

THE EVOLUTION OF THE TERMINATION-FOR-CAUSE DEFENSE IN VIRGINIA WORKERS' COMPENSATION CLAIMS

Amanda S. Tapscott & Emily W. Martins

VOL. XXVIII, NO. 3 FALL 2016

THE EVOLUTION OF THE TERMINATION-FOR-CAUSE DEFENSE IN VIRGINIA WORKERS' COMPENSATION CLAIMS

Amanda S. Tapscott*
Emily W. Martins*

For decades there has been a disparity between the Virginia appellate courts and the Workers' Compensation Commission regarding the standard for establishing a termination-for-cause defense. In 2005, it seemed that the uncertainty was resolved in the seminal court of appeals' opinion, *Artis v. Ottenberg's Baker's, Inc*.[1] However, subsequent cases again muddied the waters. More recent cases have clarified the defense, but it remains to be seen how consistently it will be applied. And while the Commission and the court of appeals appear to be following the same standard currently, the termination-for-cause defense remains a highly fact-specific analysis that depends upon the employer's reasons for terminating the employee in question. To understand the current state of the law surrounding termination for cause, it is helpful to review the history of the defense.

I. The Evolution of Case Law before *Artis*

Before *Artis v. Ottenberg's Baker's, Inc.*,[2] the issue of termination for justified cause in Virginia workers' compensation had a seemingly straightforward standard set by the Supreme Court of Virginia in *Goodyear Tire & Rubber Co. v. Watson*.[3] There, the claimant sustained a compensable injury and was subsequently provided light duty work by the employer.[4] The claimant was discharged by the employer due to poor performance, and no evidence was presented that the claimant's poor performance was related to his work injury.[5] The Supreme Court held in *Goodyear* that a claimant who is terminated for cause unrelated to his work injury while on selective employment is not entitled to receive compensation benefits.[6]

* Ms. Tapscott is a director and Ms. Martins is an associate in the Richmond office of McCandlish Holton. Ms. Tapscott is vice-chair of the Workers' Compensation Section of the Virginia Association of Defense Attorneys.

1 Artis v. Ottenberg's Baker's, Inc., 45 Va. App. 72, 608 S.E.2d 512 (2005).

2 *Id.*

3 Goodyear Tire & Rubber Co. v. Watson, 219 Va. 830, 252 S.E.2d 310 (1979).

4 *Id.* at 832, 252 S.E.2d at 312.

5 *Id.* at 833, 252 S.E.2d at 312-13.

6 *Id.* at 833, 252 S.E.2d at 313.

Thereafter, cases emerged seeking to clarify and apply the holding in *Goodyear*. For example, in *Marval Poultry Co. v. Johnson*, the Supreme Court of Virginia was presented with the question whether a claimant on selective employment is entitled to wage loss benefits after being terminated by his employer for dishonesty.[7] The Court noted that like the claimant in *Goodyear*, there was nothing in the record to prove that this claimant was dismissed because of his injury.[8] It was found that employers have a right to demand honesty from employees in matters pertaining to employment, and thus, an employer's discharge of a claimant for dishonesty and a factual finding that the claimant had been dishonest constitute termination for justified cause and disqualify the claimant from receipt of disability benefits.[9]

A. EMPLOYER-PROVIDED VERSUS CLAIMANT-PROCURED SELECTIVE EMPLOYMENT

Thereafter, the Supreme Court sought to clarify the application of *Goodyear* in other situations. In *Goodyear* and *Marval Poultry*, the claimants were terminated from employer-provided selective employment. In *Big D Quality Homebuilders v. Hamilton*, the question of termination for cause arose in the setting of a claimant being terminated for cause from selective employment procured by the claimant.[10] The Court found that the claimant could cure his unjustified refusal of selective employment, even though he had been terminated for justified cause, because the selective employment had been procured by the claimant.[11] One year later, in *American Steel Placing Co. v. Adams*, the Court went one step further, specifying that termination for cause from selective employment procured by the claimant is not unjustified refusal of selective employment, and the claimant is therefore entitled to ongoing wage loss benefits during the claimant's unemployment.[12] A similar finding was rendered in *K&L Trucking Co. v. Thurber*, where the court of appeals held that a claimant who was terminated for cause while on selective employment the claimant had procured for himself may cure that refusal of selective employment.[13] Specifically, the court held that

> [*Goodyear* and *Marval*] do not prevent this result. In each of these cases, the Supreme Court upheld a termination of worker's compensation benefits following a claimant's discharge for cause from selective employment procured for him by his employer. Neither case stands

---

7 Marval Poultry Co., Inc. v. Johnson, 224 Va. 597, 299 S.E.2d 343 (1983).

8 *Id.* at 600-601, 299 S.E.2d at 345.

9 *Id.* at 601, 299 S.E.2d at 345-46.

10 Big D Quality Homebuilders v. Hamilton, 228 Va. 378, 322 S.E.2d 839 (1984).

11 *Id.* at 382, 322 S.E.2d at 841.

12 American Steel Placing Co., Inc. v. Adams, 230 Va. 189, 192, 335 S.E.2d 270, 272 (1985).

13 K&L Trucking Co., Inc. v. Thurber, 1 Va. App. 213, 337 S.E.2d 299 (1985).

> for the proposition that benefits will not be restored when a claimant thereafter procures selective employment.[14]

Although the court of appeals specified that its decisions in *American Steel* and *K&L Trucking* applied to specific circumstances in which the claimant was terminated from selective employment secured by the claimant, the Commission soon began to expand application of these cases to circumstances beyond those described by the court. In *Lee v. Ace Carpentry*, the claimant was terminated by his employer because he had engaged in misconduct, specifically inebriation, during his employment, and therefore he was not permitted to return to selective employment available with his employer following his misconduct.[15] The Commission agreed that the inebriation constituted misconduct and that it also constituted a refusal of selective employment.[16] The claimant subsequently secured selective employment with another employer and argued that he was entitled to a reinstatement of benefits on the basis that he had cured his refusal.[17] Even though the claimant was terminated from employer-provided selective employment, the Commission agreed that the claimant was entitled to a resumption of benefits under the findings of *K&L Trucking* and noted, "this prohibition as to resumption of compensation benefits has been overruled by the Court of Appeals."[18]

Five years later, the court of appeals, sitting en banc, clarified the circumstances under which a claimant can cure his refusal of selective employment. In *Chesapeake & Potomac Telephone Co. v. Murphy*, the court of appeals addressed whether a claimant who is terminated for justified cause from selective employment procured by the employer is entitled to a restoration of benefits if the claimant thereafter procures selective employment.[19] The court, citing *Big D Quality Builders* and *American Steel*, noted that an employee may cure his unjustified refusal to accept selective employment subsequent to his termination for cause from employment that he has procured.[20] The court noted that the Act does not require that employers make selective employment available but that the relief afforded to an employer when an employee unjustifiably refuses to accept or continue selective employment is limited to those cases in which the employer has provided or procured such employment.[21] The court found that an employee's ability to cure his prior unjustified refusal of selective employment when the employee is terminated for cause is limited to situations in which

---

14 *Id.* at 221, 337 S.E.2d at 303.

15 Lee v. Ace Carpentry, 1986 Va. Wrk. Comp. LEXIS 153, at *1 (July 31, 1986).

16 *Id.* at *2.

17 *Id.*

18 *Id.* at *3-4.

19 Chesapeake & Potomac Tel. Co. v. Murphy, 12 Va. App. 633, 406 S.E.2d 190*, aff'd en banc*, 13 Va. App. 304, 411 S.E.2d 444 (1991).

20 *Id.* at 637, 406 S.E.2d at 192.

21 *Id.* at 639, 406 S.E.2d at 193; *Big D Homebuilders*, 228 Va. at 381-82, 322 S.E.2d at 841.

the selective employment was procured by the employee and not procured or offered by the employer.[22] The court explained:

> Where a disabled employee is terminated for cause from selective employment procured or offered by his employer, any subsequent wage loss is properly attributable to his wrongful act rather than his disability. The employee is responsible for that loss and not the employer. In this context, we are unable to find any provision within the Workers' Compensation Act which evidences an intent by the legislature to place such an employee in a better position than an uninjured employee who is terminated for cause and by his wrongful act suffers a loss of income.[23]

The Commission followed the lead of the court of appeals two years later. In contrast to its 1986 finding in *Lee*, the Commission issued a 1993 review opinion in *Turner v. Wampler Longacre Chicken*, finding that, based upon *Murphy*, a claimant who is terminated for cause while on selective employment procured by her employer forfeits her right to future compensation benefits.[24] The Commission found that the premise of *Murphy* applied in *Turner*, where the claimant was terminated due to poor performance while on selective employment provided by the employer, thus forfeiting her right to future benefits and making the issue of marketing irrelevant.[25] At this point, it appeared that the courts and the Commission were applying a consistent standard to answer whether a claimant was entitled to a resumption of benefits.

B. TERMINATION FOR CAUSE VERSUS TERMINATION FOR REFUSAL OF SELECTIVE EMPLOYMENT

In the same year that *Murphy* was decided, the court of appeals clarified that the rule from *Goodyear* still applied: an employee who is terminated for a reason related to his disability may cure his refusal of selective employment. Furthermore, the court made clear that refusal of selective employment is a reason related to disability. In *Timbrook v. O'Sullivan Corp.*, the court of appeals found that when an employer terminates a partially disabled employee for unjustifiably failing or refusing to report for selective employment, the employee is not barred from curing the unjustified refusal.[26] The court held that the decision in *Murphy* was not controlling in this case, as the reason for this employee's discharge was her refusal to report for selective employment, which the court opined "is not a discharge for cause unrelated to an injured employee's disabil-

---

22 *Murphy*, 12 Va. App. at 639, 406 S.E.2d at 193.

23 *Id.* at 639-40, 406 S.E.2d at 193.

24 Turner v. Wampler Longacre Chicken, Inc., 1993 Va. Wrk. Comp. LEXIS 2303, at *12 (Dec. 20, 1993).

25 *Id.* at *11.

26 Timbrook v. O'Sullivan Corp., 17 Va. App. 594, 439 S.E.2d 873 (1991).

ity."[27] The court found that since the employee made a bona fide offer to accept selective employment, she had cured her refusal, and was thus entitled to reinstatement of her award of wage loss benefits.[28]

In *Eppling v. Schultz Dining Programs*, the court of appeals again limited the finding in *Murphy*.[29] In *Eppling*, the employee was terminated from employer-provided selective employment because of excessive absenteeism due to non-work-related health problems.[30] The court held that the employee's "inability to attend satisfactorily to her selective employment job due to unrelated health problems, the conduct that led to her discharge, was equivalent to an unjustified refusal of selective employment for purposes of the Act."[31] However, the court found that the employee's inability to perform selective employment "warrants a suspension of compensation benefits until such time as the worker cures the situation by proving that the health problems have resolved to the point that the worker can perform selective employment satisfactorily and has made a reasonable effort to market his or her residual work capacity."[32] Thus, the court found that where a claimant was terminated based on unjustified refusal of selective employment due to unrelated health problems, the claimant is entitled to indemnity benefits if the claimant has proven the renewed ability to perform selective employment as it relates to the unrelated health conditions, and that she has made a reasonable effort to market her residual work capacity.[33]

By contrast, in *Richfood, Inc. v. Williams*, the claimant was terminated because he failed to pass a drug screening, which was a condition of his employment pursuant to a written agreement with the employer.[34] The court of appeals found that such termination was for cause and was not merely a refusal of selective employment. Thus, any subsequent wage loss was due to the claimant's wrongful act rather than his disability and was therefore not the responsibility of the employer.[35] The court in this case relied heavily upon the finding in *Murphy*. In reversing the Commission's finding, the court noted that the Commission's reliance on *Timbrook* was misplaced, distinguishing between a termination for cause and a termination for refusal of selective employment (specifically, the court noted that an employee can cure refusal, but cannot cure misconduct).[36]

---

[27] *Id.* at 595, 439 S.E.2d at 874.

[28] *Id.*

[29] Eppling v. Schultz Dining Programs, 18 Va. App. 125, 442 S.E.2d 219 (1994).

[30] *Id.* at 128, 442 S.E.2d at 221.

[31] *Id.* at 127, 442 S.E.2d at 220.

[32] *Id.*

[33] *Id.* at 130-31, 442 S.E.2d at 222.

[34] Richfood, Inc. v. Williams, 20 Va. App. 404, 405, 457 S.E.2d 417, 417 (1995).

[35] *Id.*

[36] *Id.* at 409-10, 457 S.E.2d at 419-20.

The Commission applied the same rule in *Gray v. Ogden Projects*, where the deputy commissioner found that, although the claimant had been terminated for cause, the termination was not for "justified cause" resulting in a forfeiture of future indemnity benefits.[37] The Commission, citing the *Richfood* decision, noted that in a termination, the violation of a company drug policy constitutes justified cause.[38] The Commission did note that the forfeiture of benefits applies only to periods during which a claimant is capable of selective employment, and that the claimant remains eligible to receive total disability when totally disabled as a result of his work injury.[39]

C. "WILLFUL MISBEHAVIOR, " TERMINATION FOR CAUSE, AND TERMINATION FOR JUSTIFIED CAUSE

Whether a termination was for a refusal of selective employment or for a cause unrelated to the disability was not the only question that arose, however. In 1994, fissures began to emerge in the Commission, as the review opinions began to distinguish "termination for cause" from "willful misbehavior."

The "willful misbehavior" analysis entered the equation in *Tilton v. Sentara Hampton General Hospital*,[40] when the Commission cited *Richmond Cold Storage Co. v. Burton*,[41] a court of appeals' decision that recited the Virginia Employment Commission's (VEC) standard for disqualifying an individual from benefits under Code section 60.1-58. Under that statute, an individual is disqualified from receiving unemployment benefits if he has been "discharged for misconduct connected with his work."[42] In *Branch v. Virginia Employment Commission*, the Supreme Court interpreted that provision to mean "deliberately violates" or "willful[ly] disregards."[43] In *Burton*, the court of appeals was considering whether a finding that a claimant had been discharged for misconduct under Code section 60.1-58 collaterally estops a claimant from arguing to the Workers' Compensation Commission that he was not terminated for justified cause.[44] The court of appeals found that the standards used by the VEC and the Commission were different.[45] Therefore, regardless of the VEC's finding, the Commission could still find that the claimant's dismissal was unjustified.[46]

---

37 Gray v. Ogden Projects, 1995 Va. Wrk. Comp. LEXIS 2222, at *3-4 (Sept. 21, 1995).

38 *Id.* at *4.

39 *Id.* at *4-5.

40 Tilton v. Sentara Hampton Gen. Hosp., 1994 Va. Wrk. Comp. LEXIS 2074, at *5 (Aug. 25, 1994).

41 Richmond Cold Storage Co. v. Burton, 1 Va. App. 106, 110, 335 S.E.2d 847, 850 (1985).

42 *Id.*

43 *Id.* at 111, 335 S.E.2d at 850 (citing Branch v. Virginia Employment Comm'n, 219 Va. 609, 249 S.E.2d 180 (1978)).

44 *Id.* at 110, 335 S.E.2d at 850.

45 *Id.* at 111, 335 S.E.2d at 850.

46 *Id.*

In *Tilton*, the Commission cited *Burton* for a different proposition. The majority in *Tilton* found that the claimant was terminated for justified cause due to poor job performance while on employer-provided selective employment.[47] The majority recited the VEC standard from *Burton* and *Branch* as the standard for determining whether a dismissal was justified under the Workers' Compensation Act. The dissent also noted that while the termination was for cause, the employer failed to prove "willful misbehavior, " and the termination was therefore insufficient to permanently bar the claimant from receipt of future compensation benefits.[48]

One month later, in *Khanna v. Dryhome Roofing*,[49] the Commission again addressed the definition of *termination of justified cause* and whether it was sufficient to result in a claimant's forfeiture of future compensation benefits while on light duty. The Commission noted:

> The standard for determining whether a dismissal for misconduct is "justified" so as to insulate the employer from compensation liability has been defined by the Court of Appeals: "In our view, an employee is guilty of 'misconduct connected with his work' when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer." *Richmond Cold Storage Co. v. Burton*, 1 Va. App. 106, 111, 335 S.E.2d 847 (1985), quoting *Branch v. Virginia Employment Commission*, 219 Va. 609, 249 S.E.2d 180 (1978). The burden is on the employer to prove all the elements of this defense, including that the alleged misconduct was willful and deliberate. These terms have been defined to import a wrongful intention, an intention to do an act that the employee knows or ought to know is wrong. *King v. Empire Collieries Co.*, 148 Va. 585, 139 S.E.2d 478 (1927).[50]

The Commission agreed that the claimant's awareness of his work schedule and failure to report to work on days for which he was scheduled to work constituted justified cause.

However, a more dramatic shift in the Commission occurred one month later, as documented in *Corr v. American Vending Concepts, Inc*.[51] In that case, the claimant had numerous documented job performance issues before his work accident.[52] The claimant returned to selective employment following his accident

---

47 *Tilton*, 1994 Va. Wrk. Comp. LEXIS 2074, at *5.

48 *Id.* at *6-7 (Diamond, Comm'r, dissenting).

49 Khanna v. Dryhome Roofing, 1994 Va. Wrk. Comp. LEXIS 2240, at *4 (Sept. 20, 1994).

50 *Id.* at *4-5.

51 Corr v. American Vending Concepts, Inc., 1995 Va. Wrk. Comp. LEXIS 2990 (Oct. 25, 1995).

52 *Id.* at *1-2.

and was terminated after the employer noted ongoing performance issues, which included receiving complaints about the claimant's work from four different clients.[53] The Commission majority found that the claimant was discharged for poor performance but that the nature of his conduct was not such that warrants permanent forfeiture of temporary partial benefits.[54] Thus, the Commission held that the claimant was able to cure his unjustified refusal of selective employment by either showing adequate marketing or by securing comparable employment.[55]

Two years later, the court of appeals relied upon the finding in *Eppling* when it rendered its opinion in *Walter Reed Convalescent Center/Virginia Health Services, Inc. v. Reese*.[56] The claimant was provided with a light duty job by the employer and was disciplined numerous times for failing to complete forms, transcriptions, and various tasks, completing erroneous transcriptions, placing physician orders in the wrong book, and various other issues resulting in her termination.[57] Employee counseling forms contained space for the claimant to explain her mistakes, and she never reported that her mistakes were due to her injury.[58] The claimant testified at her hearing that she could not keep up with the workload due to her injury and alleged that she told her supervisor, whereas the employer representative testified that the claimant made amendments to the light duty job description that were accepted by the employer, and although the claimant was instructed to ask for help if necessary, the claimant never requested assistance.[59] The employer testified that the claimant did not have trouble performing the actual job duties and that she was terminated due to her errors and failure to perform tasks.[60] The court quoted *Eppling*, noting that "In order to work a forfeiture, the 'wage loss [must be] properly attributable to [the employee's] wrongful act . . . for which the employee is responsible.'"[61] Most important, the court went on to note, "[w]e find no case law to support the commission's holding that the employer must prove that the employee's wrongful act was intentional, willful, or deliberate in order to justify a termination for cause and a forfeiture of compensation benefits."[62] The court held that the credible evidence found that "the claimant's failure to properly perform her job was caused by her incompetence, not her injury."[63]

---

53 *Id.* at *2.

54 *Id*. at *3.

55 *Id*. at *3-4.

56 Walter Reed Convalescent Ctr./Virginia Health Servs., Inc. v. Reese, 24 Va. App. 328, 331-32, 482 S.E.2d 92, 94 (1997).

57 *Id.* at 331-32, 482 S.E.2d at 94.

58 *Id.* at 332, 482 S.E.2d at 94.

59 *Id.* at 332-333, 482 S.E.2d at 95.

60 *Id.*

61 *Id*. at 336, 482 S.E.2d at 97 (quoting *Eppling*, 18 Va. App. at 129, 442 S.E.2d at 222 (citation omitted)).

62 *Id*. at 336-37, 482 S.E.2d at 97.

63 *Id.* at 338-39, 482 S.E.2d at 98.

Whereas the court of appeals' decisions continued to focus on whether the claimant's termination is for a reason related to the claimant's conduct or due to the claimant's work injury, the Commission continued to make distinctions between "termination for cause" and "termination for justified cause" with increasing frequency. In *Dehart v. Reynolds Metals Co.*, the claimant was provided with selective employment by her employer, and several instances of tardiness and missed days of work were documented.[64] The claimant was first given an oral warning, followed by a written warning after subsequent infractions, and then a suspension after additional infractions along with a final oral warning that any further infraction could result in termination.[65] On July 31, 1996, the claimant contacted her physician at 8:25 A.M. to inform him that she would be late for her appointment since she had overslept due to a headache; she was informed that he would not be able to schedule her that morning.[66] She returned to her employment shortly before noon and notified her employer that her doctor had instructed her to continue light duty but failed to inform her employer that she had not attended her appointment and had merely spoken to her doctor on the telephone.[67] Her employer later received a note from the physician indicating, "overslept appt due to headache." The claimant was terminated for excessive absenteeism, a history of warnings, and for the misrepresentation regarding her appointment with the doctor.[68] The claimant alleged that it was not her intention to be improperly paid by the employer for the morning of her headache.[69] The Commission found that the claimant was terminated for cause but not for "justified cause" that bars her from receipt of future compensation benefits, as her behavior did not rise to the level of "willful misbehavior" to merit such forfeiture.[70]

The Commission addressed the same issue a short time later in *Guzman v. Fairfax County Housing*[71] with opposite results. The claimant testified that he had an arrangement with his supervisor that he could use sick/vacation leave or unpaid leave to care for his pregnant wife, who was on bed rest, or for his children.[72] His supervisor confirmed this arrangement and acknowledged that the claimant did not always call ahead of time to inform his supervisor that he would be absent on a given day.[73] Evidence of a number of reprimands were presented, and the claimant provided testimony in response, which included dis-

---

64 Dehart v. Reynolds Metals Co., 1997 Va. Wrk. Comp. LEXIS 4970, at *1-2 (July 22, 1997).

65 *Id*. at *2.

66 *Id*.

67 *Id*. at *2-3.

68 *Id*. at *3.

69 *Id*. at *4.

70 *Id*.

71 Guzman v. Fairfax Cnty Hous., 1998 Va. Wrk. Comp. LEXIS 5579 (Jan. 22, 1998).

72 *Id.* at *1.

73 *Id*. at *2.

puting the facts upon which the reprimands were based, testifying that his employer sent him home on certain days, and alleging that doctor's notes were provided to his employer for dates of illnesses.[74] The employer provided a letter sent to the claimant that indicated that due to privatization of custodial positions, the claimant's position was being eliminated at the end of the month.[75] The Commission focused solely on the final two pay periods, noting that the claimant failed to offer explanations for ten and one-half work days that were missed. In finding that the claimant was terminated for justified cause, the Commission found:

> The claimant had been reprimanded and suspended for unexcused absences and failure to report. While he may have had sufficient excuse for some of the absenteeism, there was not sufficient excuse for other absenteeism. The Court draws a logical distinction between absenteeism for unrelated causes which are basically beyond an employee's control and those which are within his control. Certainly, it would be unfair to prevent an employee from curing a refusal of selective employment when the reasons for the refusal are beyond his control or for which he has a reasonable excuse. On the other hand, there is much more justification for not allowing a cure of a refusal of selective employment where the termination is based on excessive absenteeism, and the employee has been counseled and disciplined for this infraction and still does not justify a significant number of the days absent.[76]

The Commission acknowledged the court of appeals' finding in *Reese* and even specifically noted in 2000 that

> [t]he Court, in *Reese*, explained that the standard requiring an employer to prove that the employee's termination was caused by the employee's willful or deliberate misconduct at work only "applies to a proceeding before the Virginia Employment Commission to determine whether an employee has been discharged for misconduct so as to bar unemployment compensation benefits." The Court explained: "We have never held that a wrongful act which does not necessarily rise to the level of willful or deliberate cannot constitute justification for a termination for cause from selective employment so as to cause a forfeiture of workers' compensation benefits."[77]

The Commission used the finding in *Reese* in support of an argument that showing a deliberate or willful act was unnecessary for a permanent forfeiture of

---

74 *Id*. at *2-5.

75 *Id*. at *2.

76 *Id*. at *10-11.

77 Muhammad v. VSI Group, 2000 Va. Wrk. Comp. LEXIS 1580, at *7 (Dec. 8, 2000) (quoting *Reese*, 24 Va. App. at 336-37, 482 S.E.2d at 97).

benefits. Nevertheless, the Commission continued to impose a measure upon the actions of the claimant in finding that the claimant's termination was based upon the type of wrongful act that justifies forfeiture of benefits, as it was "egregious."[78]

II. THE *ARTIS* TEST

The seminal termination-for-cause decision was memorialized by the court of appeals in 2005 when the court issued its decision in *Artis v. Ottenberg's Baker's, Inc.*,[79] where the claimant was terminated after staging a robbery in an attempt to murder a coworker. Although the claimant argued that his actions were due to his compensable psychiatric condition, the Commission found that the evidence implicated a variety of factors leading to his behavior that were not compensable, thereby finding the claimant was terminated for justified cause.[80] The court of appeals affirmed the Commission and reaffirmed that the proper analysis is whether the claimant's termination is for a reason related to the claimant's conduct or due to the claimant's work injury.

The court, citing *Reese*, noted that it is unnecessary to prove that the employee's wrongful act was intentional, willful, or deliberate in order to justify a termination for cause and a forfeiture of compensation benefits, specifying that "all that is required is a showing: (1) that the wage loss is 'properly attributable' to the wrongful act; and (2) that the employee is 'responsible' for that wrongful act."[81] Pertaining to the first prong, the court noted that "[t]he overriding inquiry is as follows: Was the claimant fired because of his disability, or was he fired because of his misconduct?"[82] The court, citing *Washington Metro Area Transit Authority v. Harrison*, noted that the burden is upon the claimant to demonstrate that his termination was attributable to his disability.[83] The court elucidated that deciding if the claimant was fired due to his disability depended on whether he was fired because his disability prevented him from adequately performing his duties.[84]

Applying this test, the court of appeals noted that the claimant had been performing his full duties for at least six months before the staged robbery and was not fired because his disability prevented him from performing physical duties of the job or from driving certain routes.[85] It was noted that the claimant was fired because he staged a robbery, misappropriated employer funds, and in-

---

78 *Id.* at *7-8.

79 Artis v. Ottenberg's Baker's, Inc., 45 Va. App. 72, 608 S.E.2d 512 (2005).

80 *Id.* at 82-83, 608 S.E.2d at 516-17.

81 *Id.* at 85, 608 S.E.2d at 518 (citations omitted).

82 *Id.* at 86, 608 S.E.2d at 518.

83 *Id.* (citing Washington Metro. Area Transit Auth. v. Harrison, 228 Va. 598, 600-602, 324 S.E.2d 654, 655-56 (1985)).

84 *Id.*

85 *Id.* at 86, 608 S.E.2d at 519.

tended to murder a supervisor.[86] In rejecting the claimant's argument that his actions were due to an unbroken chain of events related to his injury, the court opined, "[b]ecause such a rule would inevitably lead to absurd results, we hold instead that there must be an immediate, proximate nexus between the disability and the termination for the termination to be deemed 'attributable to' the disability."[87] It was noted that here, the claimant's own willful, volitional misconduct constitutes an intervening cause sufficient to break the chain of causation, and the court further found that the misconduct was caused by issues not directly related to the initial trauma.[88] While *Artis* set forth a seemingly straightforward two-prong test, much discussion arose in subsequent cases regarding whether an assessment of the egregiousness of a claimant's misconduct was still part of the analysis.

III. The Evolution of Case Law after *Artis*

A. the "egregiousness" standard

After *Artis*, the Commission wrestled with the application of the two-prong test that had recently been solidified by the court of appeals. As evidenced in the following cases, the Commission continued to distinguish egregious conduct from nonegregious conduct in making determinations as to forfeiture of benefits.

For example, in *Coker v. Amerco U Haul International, Inc.*, the claimant was fired for subpar performance in her work, specifically failing quality control testing as a phone operator and leaving a storage unit unlocked.[89] The Commission returned to using the VEC definition of misconduct, citing the legal standard for a justified discharge to be when an "employee deliberately violates a company rule reasonably designed to protect the legitimate business interest of the employer, or when the acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer."[90] The Commission distinguished *Artis* by finding that unlike the present behavior, the conduct in *Artis* was sufficiently egregious to warrant a permanent forfeiture of the future workers' compensation benefits. Claimant's conduct here did not amount to a "willful disregard of the employer's business interests."[91]

Similarly, in *Knighton v. Brett Aggregates, Inc.*, the claimant was fired for absenteeism, specifically missing ten days before the work accident in a ninety-day probationary period.[92] The Commission cited the *Artis* two-prong test in find-

---

86 *Id.*

87 *Id.* at 88, 608 S.E.2d at 519.

88 *Id.* at 88, 608 S.E.2d at 520.

89 Coker v. Amerco U Haul Int'l, Inc., 2006 Va. Wrk. Comp. Lexis 1355, at *4-5 (Feb. 24, 2006).

90 *Id.* at *17.

91 *Id.* at *17-18.

92 Knighton v. Brett Aggregates, Inc., 2006 Va. Wrk. Comp. Lexis 2093, at *2 (Sept. 19, 2006).

ing that the claimant was terminated for cause, based on his absenteeism.[93] However, the Commission reversed the deputy commissioner's finding that benefits were permanently forfeited, instead finding that "his behavior did not rise to a level such that permanent forfeiture of his compensation is warranted."[94]

Likewise, in *Savage v. County of Prince William*, the claimant was terminated for failing to follow protocol regarding visiting a child's home and failing to timely report a car accident to the employer.[95] The Commission again cited *Artis* but ultimately concluded that "while the claimant is responsible for her actions that day, we simply do not believe that they rise to a level that 'warrants permanent forfeiture of those rights and benefits.'"[96]

This pattern continued in *Wegman v. Tyson Foods, Inc*.[97] There, the claimant was terminated for failing to follow the lock-out, tag-out procedure.[98] The Commission cited the legal standards of *Reese* and *Artis*, ultimately finding that while the claimant was terminated for cause, it was not justified cause.[99] The Commission noted that the "employer had cause to terminate him, but we cannot agree that it rose to the level of justified cause under the facts of this case."[100] The Commission justified this finding by stating that one of the two times the claimant failed to follow the lock-out, tag-out procedure, he was following the instruction of a supervisor.[101] The Commission noted, "the result would be different if the claimant had not been following his supervisor's lead."[102]

After a string of cases continuing to incorporate an egregiousness standard in the legal analysis, the court of appeals again addressed this issue in *Shenandoah Motors, Inc. v. Smith*.[103] The court reversed the Commission's rejection of the defendants' termination for cause defense.[104] This case addressed a situation in which a claimant was terminated for poor job performance and attitude and therefore missed the opportunity for subsequent selective employment with the employer.[105] However, in a footnote, the court outlined the following:

> [W]e need not fully address employer's alternate contention that the commission erred in finding that the conduct for which claimant was

---

93 *Id.* at *5-6.

94 *Id.* at *7.

95 Savage v. County of Prince William, 2007 Va. Wrk. Comp. LEXIS 1518, at *5-8 (July 13, 2007).

96 *Id.* at *8-9.

97 Wegman v. Tyson Foods, Inc., 2007 Va. Wrk. Comp. LEXIS 1664 (Sept. 4, 2007).

98 *Id.* at *4-5.

99 *Id.* at *5-8.

100 *Id.* at *7-8.

101 *Id.* at *7.

102 *Id.* at *8.

103 Shenandoah Motors, Inc. v. Smith, 53 Va. App. 375, 672 S.E.2d 127 (2009).

104 *Id.* at 393, 672 S.E.2d at 135.

105 *Id.* at 379-80, 672 S.E.2d at 128-29.

> terminated was not sufficiently egregious to negate the need for an actual bona fide offer of suitable employment and warrant a forfeiture of her disability benefits under Code § 65.2-510(A). Suffice it to say, no such legal standard has been recognized by this Court. Indeed, as previously mentioned, we held in *Artis* that "all that is required [to establish a termination for cause and forfeiture of subsequent compensation benefits] is a showing: (1) that the wage loss is 'properly attributable' to the [employee's] wrongful act; and (2) that the employee is 'responsible' for that wrongful act."[106]

The court of appeals' footnote in *Shenandoah Motors* was confirmed in *Chemical Producers and Distributors Associations, Inc. v. Perry*.[107] There, the claimant was terminated for poor work performance, failing to work as a team member, failing to perform her job duties, and having difficulty prioritizing tasks.[108] The Commission found that the termination was reasonable but found that the conduct was not so egregious that she should be forever without the right to receive compensation benefits.[109] The employer appealed to the court of appeals, which reiterated the standard set forth in *Artis*.[110]

The court of appeals noted that the Commission had made findings that the termination was not due to the disability and that finding was binding on the court.[111] However, the court noted that the Commission had failed to conduct any analysis or findings with respect to the second prong of the *Artis* test.[112] Further, the court noted "the commission concluded that Perry's 'conduct was not so egregious that she should forever lose the right to receive compensation benefits.'[113] This was not the correct legal standard for the commission to apply."[114] Therefore, the court remanded to the Commission for a determination whether the claimant's conduct was voluntary or involuntary, so those findings could be applied to the correct legal standard set forth in *Artis*.[115]

The Commission's case law immediately following *Shenandoah Motors* and *Chemical Producers* adhered to the enunciated standard of *Artis*. Specifically, in *Hepler v. Petroleum Marketers, Inc.*, the claimant was terminated for exceedingly poor job performance.[116] The Commission, in a split decision with Commissioner Diamond dissenting, applied the *Artis* two-prong test and found that

---

106 *Id.* at 392 n.3, 672 S.E.2d at 135 n.3.

107 Chemical Producers and Distrib. Ass'ns, Inc. v. Perry, 2009 Va. App. LEXIS 259 (June 9, 2009).

108 *Id.* at *3.

109 *Id.*

110 *Id.* at *6-7.

111 *Id.* at *7.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 Hepler v. Petroleum Marketers, Inc., 2009 Va. Wrk. Comp. LEXIS 1044, at *9 (Oct. 19, 2009).

the claimant's termination was justified and constituted a forfeiture of benefits based on that analysis.[117]

The Commission again followed *Artis* in *Riddick v. Coastal Masonry, Inc*.[118] There, the claimant was terminated for absenteeism.[119] The split Commission, again with Commissioner Diamond dissenting, outlined the *Artis* test and applied the facts of the claim to the two-prong test.[120] The Commission reversed the deputy commissioner's opinion and found that the claimant's termination was justified.[121]

However, the court of appeals revived the language of "willful misconduct" in *Montalbano v. Richmond Ford, LLC*,[122] where it curiously relied less on the two-prong analysis of *Artis* and focused more on the nature of the misconduct and whether it constituted justified cause. In *Montalbano*, the claimant was terminated for verbally harassing fellow coworkers.[123] The court detailed the standard set forth in pre-*Artis* cases, and then cited *Eppling*, stating that "[a]n employee's workers' compensation benefits will be permanently forfeited only when the employee's dismissal is 'justified,' the same as any other employee who forfeits her employment benefits when discharged for a 'justified' reason."[124] After proceeding to cite the *Artis* two-prong test, the court stated "our inquiry, then, is whether claimant's continued harassment of his subordinates, including repetitive abusive language, constitutes 'justified cause' for termination thus barring any award of benefits."[125] The court found this behavior did constitute justified cause and found, "in the context of unemployment benefits, we have addressed factors to determine whether abusive language constitutes willful misconduct . . . . We find these factors are equally applicable in evaluating whether abusive language is 'justified cause' for termination."[126] The court concluded that the claimant's repetitive harassment of his subordinates through anger and abusive language was "justified cause" for his termination that justified a forfeiture of benefits.[127]

Subsequently, the Commission and court of appeals both addressed cases in which a claimant's wrongful act was related to the work injury, under the first prong of the *Artis* test. In *Parker v. Tyson Foods, Inc.*, the claimant was termi-

---

117 *Id.* at *9-10.

118 Riddick v. Coastal Masonry, Inc., 2009 Va. Wrk. Comp. LEXIS 956 (Nov. 4, 2009).

119 *Id.* at *19.

120 *Id.* at *18-19.

121 *Id.* at *19.

122 Montalbano v. Richmond Ford, LLC, 57 Va. App. 235, 701 S.E.2d 72 (2010).

123 *Id.* at 241-42, 701 S.E.2d at 75.

124 *Id.* at 245, 701 S.E.2d at 77 (quoting *Eppling*, 18 Va. App. at 128, 442 S.E.2d at 221).

125 *Id.* at 246-47, 701 S.E.2d at 77.

126 *Id.* at 247, 701 S.E.2d at 77-78.

127 *Id.* at 247, 701 S.E.2d at 77-78.

nated for absenteeism.[128] However, the Commission found that part of his absenteeism had to do with the work injury.[129] Therefore, the Commission found that the claimant was not terminated for "wrongful acts."[130] The Commission further noted that the claimant's conduct leading to his job termination did not justify a permanent forfeiture of benefits.[131]

The court of appeals affirmed the Commission's finding that the claimant's conduct leading to her termination was not voluntary and was instead attributable to her injury and its residual effects in *Pier 1 Imports v. Wright*.[132] In that case, the claimant suffered from post-traumatic headaches and post-concussive syndrome that she believed contributed to her difficulty in properly managing the store.[133] Under the second prong of *Artis*, the court said the inquiry is whether the claimant's wrongful act is "purely voluntary."[134] Here, the Commission made a factual finding that the claimant's poor performance that led to her termination was at least in part caused by her disability.[135] Accordingly, the court affirmed the award of benefits to the claimant, disagreeing with the defendants' argument that the claimant's termination barred her receipt of benefits.[136]

Despite the court of appeals' focus on the voluntariness of the act, the "egregiousness standard" appeared to reenter the Commission's legal analysis in *Deardorff v. Town & Country Animal Hospital*.[137] There, the claimant was terminated for insubordination. The deputy commissioner did not find it credible that the claimant was terminated for this reason, as the event leading to the alleged insubordination was an unwitnessed event.[138] Further, both the claimant and the supervisor testified that they disliked each another.[139] The Commission outlined the two-prong *Artis* test but specified that the first prong included an analysis of whether the termination was related to the disability, as well as an analysis of whether the "'nature' of the wrongful conduct resulting in the termination [is] such as would justify a permanent forfeiture of benefits."[140] The Commission noted that the court in *Artis* analyzed the nature of the conduct in

---

128 Parker v. Tyson Foods, Inc., 2011 Va. Wrk. Comp. LEXIS 1286, at *7 (Dec. 1, 2011).

129 *Id.* at *18-19.

130 *Id.* at *19.

131 *Id.*

132 Pier 1 Imports v. Wright, 2012 Va. App. LEXIS 177, at *10-11 (May 29, 2012).

133 *Id.* at *3.

134 *Id.* at *10-11.

135 *Id.* at *10.

136 *Id.*

137 Deardorff v. Town & Country Animal Hosp., 2013 Va. Wrk. Comp. LEXIS 1262 (Jan. 3, 2013).

138 *Id.* at *14.

139 *Id.* at *14-15.

140 *Id.* at *18-20.

that case and found that it constituted a permanent forfeiture of benefits.[141] Relying upon the impressions of the deputy commissioner, the Commission found that the claimant's conduct did not rise to a level to justify a permanent forfeiture of benefits.[142] The Commission did not address the second prong of *Artis*.

Continuing the pattern of expanding the first prong of *Artis*, the Commission in *Nye v. Virginia Group Home Services*, found that the "claimant's conduct [did] not rise to the level of a termination for cause so as to result in a forfeiture of future benefits. Instead, we find the claimant's actions constitute a refusal of selective employment."[143]

Although the Commission did not specify that the egregiousness of the conduct was a factor in *Jenkins v. Dubrook Concrete, Inc*., it appears that the nature of the misconduct was taken into account in finding that the claimant's conduct constituted a termination for cause.[144] There, the claimant was terminated for violating a final warning regarding violent and aggressive behavior. This focus on the egregious nature of the conduct continued until recently.

B. SETTLING THE MODERN STANDARD

After continued departure from the two-prong test of *Artis*, the court of appeals again clarified the correct legal standard for this analysis. In *Riverside Behavioral Centers v. Teel*, the claimant was terminated for documenting medication that he did not administer to a patient.[145] The deputy commissioner found that the claimant was not terminated for cause, as the claimant's poor work performance did not constitute a wrongful act under the case law.[146] The deputy commissioner did find, however, that the claimant refused selective employment because of his termination.[147] The full Commission reversed the deputy's findings that the claimant had constructively refused selective employment.[148] In a footnote, the Commission addressed the claimant's termination, noting that the termination was not for a cause that would justify a permanent forfeiture of benefits.[149] The Commission further noted that "the claimant's 'misuse of the company's computer system—documenting that he did not administer the medication, while indicating elsewhere that he did—does not constitute a deliberate violation of a company rule.'"[150] The court of appeals again clarified that this legal analysis was incorrect and echoed the language

---

141 *Id.* at *20.

142 *Id.*

143 Nye v. Virginia Group Home Servs., 2014 Va. Wrk. Comp. LEXIS 681, at *10 (Feb. 8, 2012).

144 Jenkins v. Dubrook Concrete, Inc., 2014 Va. Wrk. Comp. LEXIS 837, at *6 (June 24, 2014).

145 Riverside Behavioral Ctrs. v. Teel, 2015 Va. App. LEXIS 158, at *2 (May 12, 2015).

146 *Id.* at *4.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* at *4-5.

from *Reese* and *Shenandoah Motors*, stating that "we find no case law to support the commission's holding that the employer must prove that the employee's wrongful act was intentional, willful or deliberate in order to justify a termination for cause and a forfeiture of compensation benefits."[151] The court proceeded to outline again the *Artis* two-prong test. Given that there was no dispute that the claimant's wage loss was attributable to his wrongful act or that he was responsible for the act, the court found, as a matter of law, that the claimant's termination was for justified cause.[152] The court also clarified in a footnote that the analysis for justified cause "is not dependent on whether the employee was on selective employment or full duty, but rather whether the employee was terminated for justified cause unrelated to a disability and whether his wage loss was properly attributable to the conduct for which he was responsible."[153]

The analysis in *Teel* was reiterated in subsequent case law from the Commission. Specifically, in *Buracker v. Cam Repairs & Group Cam, LLC*, the claimant was terminated for poor job performance.[154] The deputy commissioner held that although the claimant was terminated for cause, it was not justified cause that would permanently bar the receipt of benefits but was instead a refusal of selective employment that was subsequently cured.[155] The Commission, in a split decision with Commissioner Marshall dissenting, outlined the lengthy case law in this area. The Commission ultimately found that "it is not the egregiousness of the conduct causing the termination which is to be considered, but rather whether the claimant was terminated for a reason related to his disability."[156] The Commission in *Buracker* relied heavily on recent precedent from the court of appeals, solidifying that the *Artis* analysis remains good law and that the egregiousness standard is not appropriately included in this analysis.

IV. Practical Application

As evidenced by the extensive body of case law outlined herein, the viability of a termination-for-justified-cause defense rests upon the facts of each case. A review of the case law in the area highlights the Commission's evaluation and reliance upon witness testimony, personnel documentation, and employment manuals in determining whether a termination defense will prevail.

Therefore, from a defense perspective, it is important to counsel clients on the importance of appropriately documenting terminations through write-ups, summaries of meetings and discussions, and by having the appropriate documents in the employee's personnel file to prove the termination. To the extent that a

---

151 *Id.* at *6-7.

152 *Id.* at *12.

153 *Id.* at *8-9 n.2.

154 Buracker v. Cam Repairs & Group Cam, LLC, 2015 Va. Wrk. Comp. Lexis 369, at *4 (Aug. 17, 2015).

155 *Id.*

156 *Id.* at *14.

termination involves the employer's rules, policies, or safety objectives, securing documentary evidence is of paramount importance. While witness testimony may lend credibility and allow for further explanation of an employer's particular policies or rules in a hearing, having the specific written policy or rule will likely aid in asserting such a defense.

Finally, while this article has addressed the treatment of the termination defense in the context of Virginia workers' compensation claims, it is important to note that additional avenues of employer liability outside the scope of workers' compensation may be implicated in a worker's termination from employment. In order to appropriately advise a client on these issues, it is recommended that an attorney specializing in employment law be consulted.